No. 44259-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jared Pinson,

Appellant.

Mason County Superior Court Cause No. 12-1-00304-1

The Honorable Judge Toni Sheldon

Appellant's Opening Brief

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor commits misconduct by "testifying" to "facts" outside the record. Here, the prosecutor told jurors about the "symptoms" that characterize domestic violence relationships, despite the absence of any testimony on the subject. Did the prosecutor commit misconduct that violated Mr. Pinson's Fourteenth Amendment right to due process?

2. A prosecutor may not rely on a suspect's pre-arrest silence (including partial silence) as substantive evidence of guilt. Here, the prosecutor argued that Mr. Pinson's pre-arrest silence "is evidence of his guilt." Did the prosecutor infringe Mr. Pinson's Fifth and Fourteenth Amendment privilege against self incrimination?

3. An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably introduced an unredacted exhibit containing inadmissible and prejudicial information. Did counsel's deficient performance prejudice Mr. Pinson in violation of his Sixth and Fourteenth Amendment right to counsel?

4. A suspect's pre-arrest silence may not be admitted at trial, except for impeachment purposes. Here, defense counsel introduced evidence of Mr. Pinson's pre-arrest silence without asking the court to limit the jury's consideration of the evidence. Was Mr. Pinson deprived of the effective assistance of counsel?

5. A trial court must define reasonable doubt and the burden of proof using WPIC 4.01. Here, the court used an instruction that omitted a critical portion of that instruction. Did the court's failure to tell jurors that Mr. Pinson had no burden of proving the existence of a reasonable doubt violate his Fourteenth Amendment right to due process?

6. A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed $1,200 in attorney fees without making such a finding. Did the trial court violate Mr. Pinson's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jared Pinson and his partner Stacy Campbell drank and argued one evening in the summer of 2012. Campbell bit Mr. Pinson, ran to a neighbor's house, and called 911. RP 15, 27, 66. Police responded, and Campbell claimed that Mr. Pinson had thrown her off the couch and held her neck. She declined medical attention. RP 14-16, 18-19, 21, 27.

The state charged Mr. Pinson with Assault in the Second Degree. CP 23-24.

At trial, Deputy Joel Nault testified that he had not yet completed police training academy. RP 17, 19. Even so, the court permitted Deputy Nault to tell the jury that Campbell's injuries to her neck were consistent with "signs of being held down, hand crossways, and strangled." Defense counsel did not object. RP 17, 19.

Prior to trial, the parties agreed to exclude evidence that Mr. Pinson declined to answer a question about whether or not the argument turned physical. RP 7. Despite this, defense counsel raised the issue during cross-examination of Deputy Nault:

> Q. Now, when you – you testified that you asked Mr. Pinson what had happened and he said something that they had gotten into a fight or you had asked him if they had gotten into a fight.
> A. Uh-hum.
> Q. Did you couch that term fight in – did you ask him if it was a physical fight or if it was an argument?

A. I initially asked, you know, what's going on tonight with – between you and Stacey. He said – he stated, we had been drinking tonight, before we went to bed we got into a fight. I believe that was the exact statement.
Q. Okay. Okay. But you didn't take it a step further and ask him it if it was physical or --
A. After he said it was – they got into a fight, I asked if it was physical, and he stuck with that original statement.
RP 22-23.

The trial court ruled that this questioning opened the door to additional evidence regarding Mr. Pinson's conversation with police. RP 29. During the state's redirect, the prosecutor asked:

Q. Counsel also asked you a question about - I believe you testified that you asked the defendant whether the fight that he indicated they had had that night, whether that fight got physical.
A. Correct.
Q. How did he respond to that question?
A. He said – again, he stated they had been drinking tonight and before they went to bed they got into a fight. That was what he told me. Then when I asked him if it got physical, then he again – he stuck with his first statement and then became quiet. He never indicated if it had gotten physical. He never specifically said yes, it got physical.
RP 32-33.

Police completed a five-page "Domestic Violence Victim Statement" with Campbell on the night of the incident. Defense counsel introduced the unredacted document into evidence. RP 33-35; Ex 4, Supp. CP. This exhibit included a page titled "Domestic Violence Supplemental Form" with "suspect" and "victim" information. It also included a checked box indicating "Prior DV History". The third and fourth pages

indicated that Campbell refused to give a statement, but the fifth page contained a full copy of the officer's narrative. Ex. 4, Supp. CP. This narrative included:

> "Probable cause exists for the charging and/or arrest and/or detention of the defendant bases on the following fact and circumstances: [Jared Pinson]."
>
> "[Campbell] stated 'I don' know what happened he just choked me and I couldn't breathe I was scared for my life'."
>
> "[Campbell] bit [Pinson] on the left shoulder in an attempt to escape his grasp."
>
> "[Campbell] advised [Pinson] has not been physical with her in the past."
>
> "For my safety I detained [Pinson] while I explained the situation to him."
>
> "I asked [Pinson] if the altercation between him and [Campbell] got physical and he refused to tell me."
>
> "I placed [Pinson] into custody for Assault second degree and booked him into the Mason County Jail."
>
> Page 5, Ex 4, Supp. CP.

Campbell testified, telling the jury that she'd been drinking and that no assault had occurred. RP 50-62. Mr. Pinson also testified, and denied assaulting Campbell. RP 66-69.

The court's instruction outlining the burden of proof and defining reasonable doubt differed from the pattern instruction. The court's instruction omitted the sentence reading "The defendant has no burden of

proving that a reasonable doubt exists." Instruction 3, Court's Instructions, Supp. CP.

During the state's closing argument, the prosecutor referred to Mr. Pinson's refusal to answer questions:

> The next question Deputy Nault asked him is did the fight get physical. And his answer to that is not to respond to it, which is evidence of his guilt, that he has something to hide, because as I think you all know from your common experience, if you were confronted late at night, woken up by two police officers who want to take you to jail and they confront you with that type of question, if you're innocent, you're going to have a wholly different response.
> RP 94.

The state's attorney also argued that Campbell acted like a victim of domestic violence:

> [W]hen it comes to domestic violence, a symptom of domestic violence is minimization, sometimes recantation, oftentimes selective memory. And I would submit, what you heard from Stacey Campbell on the stand was selective memory....
>
> She might also have selective memory because she lived through a traumatic event. And you all know, through personal experience, common experience, that when you live through a traumatic event, you tend to want to forget, you tend to want to forgive and you tend to want to put it on a shelf, set it aside and let it go....
>
> We treat domestic violence very seriously because if we don't, things spiral out of control.
>
> RP 95.

He returned to the theme during his rebuttal:

> Especially when you're talking about an incident of domestic violence as you go further in time, there tends to be minimization and recantation. And so, the suggestion that a follow up investigation would have helped one way or the other is not accurate.
> RP 108.

Mr. Pinson's counsel did not object to any of these arguments. RP 93-96, 107-111.

The jury voted to convict Mr. Pinson as charged. RP 117.

During sentencing, the court assessed attorney's fees of $1200. CP 11. There was no discussion on the record regarding these costs other than the state's request for them. RP 122.

Mr. Pinson timely appealed. CP 4.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT INFRINGED MR. PINSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review.

If prejudicial to the accused, prosecutorial misconduct requires reversal. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Even absent an objection during trial, flagrant and ill-intentioned misconduct requires reversal. *Id.* Where prosecutorial misconduct violates the constitutional rights of the accused, the constitutional harmless

error standard applies. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I).

B. The prosecutor committed flagrant and ill-intentioned misconduct that denied Mr. Pinson a fair trial.

Prosecutorial misconduct can deprive the accused of a fair trial. U.S. Const. Amend. XIV; *Glasmann*, 175 Wn.2d at 702-04. In considering whether prosecutorial misconduct warrants reversal, the court looks to its prejudicial nature and its cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Misconduct prejudices the accused if it creates a substantial likelihood that the jury's verdict was affected. *Glasmann*, 175 Wn.2d at 704. A reviewing court considers the prosecutor's statements during closing argument in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones I).

1. The prosecutor committed misconduct by "testifying" to "facts" outside the record.

A prosecutor commits misconduct by making statements unsupported by the evidence. *Boehning*, 127 Wn. App. at 519. When the state's attorney exposes jurors to material not properly admitted as evidence, the jury's consideration of such material "vitiates a verdict when there is reasonable ground to believe that the defendant may have been

prejudiced." *Glasmann,* 175 Wn.2d at 704. Cases turning on witness credibility magnify the prejudicial effect of a prosecutor's "testimony" to "facts" not in evidence. *Boehning*, 127 Wn. App. at 523.

At Mr. Pinson's trial, the prosecutor "testified" in closing about the "symptoms" of domestic violence and the typical domestic violence relationship:

> [W]hen it comes to domestic violence, a symptom of domestic violence is minimization, sometimes recantation, oftentimes selective memory. And I would submit, what you heard from Stacey Campbell on the stand was selective memory.
> RP 95.
>
> Especially when you're talking about an incident of domestic violence as you go further in time, there tends to be minimization and recantation.
> RP 108.

No expert witness testified at Mr. Pinson's trial regarding the "typical" domestic violence relationship. No expert testified regarding "selective memory," "symptoms" of domestic violence, minimization, recantation, or the effects of time on memory. *See* RP *generally.*

Mr. Pinson's case involved a pure credibility contest. The prosecutor's tactic of "testifying" regarding the "typical" domestic violence relationship prejudiced Mr. Pinson by encouraging jurors to rely "facts" outside the record. *Boehning*, 127 Wn. App. at 523. The

prosecutor's misconduct requires reversal of Mr. Pinson's conviction. *Glasmann*, 175 Wn.2d at 724.

2. The prosecutor committed misconduct by urging jurors to consider Mr. Pinson's exercise of his right to silence as substantive evidence of his guilt.

Accused persons have a constitutional right to remain free from self-incrimination. U.S. Const. amend V, XIV; Wash. Const. art. I, § 9. Courts liberally construe the constitutional provisions protecting the right to silence. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009).

A prosecutor commits misconduct and violates the accused's right against self-incrimination by arguing that constitutionally protected silence constitutes substantive evidence of guilt. *Knapp*, 148 Wn. App. at 420.

The constitution differentiates between pre- and post-arrest silence. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). Prosecutors may not rely on a post-*Miranda* invocation for any purpose, including impeachment. *Id.* An argument that pre-arrest silence implies guilt violates the state and federal constitutions; prosecutors may only use such silence for impeachment. *Id.* ("…when the state invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and art. I, § 9 of the Washington Constitution are violated"). Likewise, a

suspect's partial silence may not be used as evidence of guilt. *See, e.g., Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

A reviewing court presumes that an impermissible comment on the exercise of the right to silence harmed the accused unless the state proves otherwise beyond a reasonable doubt. *Fuller I*, 169 Wn. App. at 813. Constitutional error prejudices the accused unless the prosecution establishes it was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

While the accused can "open the door" to testimony on a particular subject matter under the rules of evidence, s/he has no power to "open the door" to prosecutorial misconduct. *Jones I*, 144 Wn. App. at 295.

During closing, the prosecutor argued explicitly that Mr. Pinson's exercise of his right to remain silent constituted substantive evidence of his guilt:

> The next question Deputy Nault asked him is did the fight get physical. And his answer to that is not to respond to it, *which is evidence of his guilt,* that he has something to hide, because as I think you all know from your common experience, if you were confronted late at night, woken up by two police officers who want to take you to jail and they confront you with that type of question, if you're innocent, you're going to have a wholly different response.
> RP 94 (emphasis added).

The trial record does not clarify whether Mr. Pinson's partial silence came before or after arrest. RP 23, 32-33. Even if his refusal to answer occurred pre-*Miranda*, however, the Fifth Amendment prohibits the prosecutor from using his silence as substantive evidence of guilt. *Burke*, 163 Wn.2d 204 at 216. The state blatantly violated this rule by arguing that Mr. Pinson's partial silence constituted "evidence of his guilt." RP 94; *Burke*, 163 Wn.2d at 217. The court must presume that this error harmed Mr. Pinson. *Fuller I*, 169 Wn. App. at 813.

The prosecutor committed flagrant and ill-intentioned misconduct when he "testified" to information not in evidence and told jurors to use Mr. Pinson's partial silence as evidence of his guilt. Prosecutorial misconduct requires reversal of Mr. Pinson's conviction. *Glasmann*, 175 Wn.2d at 724.

II. DEFENSE COUNSEL'S DEFICIENT PERFORMANCE DEPRIVED MR. PINSON OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provided deficient performance that prejudiced the accused. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Ineffective assistance presents an issue of constitutional magnitude that the accused may raise for the first time on appeal. *Kyllo*, 166 Wn.2d at 862.

B. Defense counsel provided deficient performance that prejudiced Mr. Pinson.

Counsel provides deficient performance through actions that (1) fall below an objective standard of reasonableness, and (2) do not qualify as a legitimate tactical decision. U.S. Const. Amend VI; *Kyllo*, 166 Wn.2d at 862. Counsel's deficient performance prejudices the accused if there exists a reasonable probability that it affected the outcome of the proceedings. *Id.*

1. Counsel provided ineffective assistance by offering an exhibit into evidence without redacting information that undercut the presumption of innocence.

A defense attorney should not introduce evidence that unfairly prejudices his or her own client. *State v. Saunders*, 91 Wn. App. 575, 578-580, 958 P.2d 364 (1998). In keeping with this principle, counsel should seek redaction of any exhibit containing information unfairly prejudicial to the accused. *Id.; see, e.g., Earls v. McCaughtry*, 379 F.3d 489, 494 (7th Cir. 2004); ER 401, ER 402, ER 403, ER 404(b).

The prosecution may not introduce evidence of the accused's prior crimes, wrongs, or acts to "prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of other wrongs becomes admissible at trial only if the court (1) finds by a preponderance of the evidence that the misconduct occurred, (2) identifies the purpose for which the proponent is offering the evidence, (3) determines that the evidence helps prove an element of the charge, and (4) weighs the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

At trial, Mr. Pinson's counsel introduced the written domestic violence form Deputy Nault completed on the night of the incident. RP 23-24, 33-34; Ex. 4, Supp. CP. Counsel apparently offered the exhibit to demonstrate that Campbell lacked numerous symptoms of strangulation listed on the form. RP 23-26; Ex. 4, Supp. CP. Counsel failed, however, to seek redaction of the form to exclude prejudicial information. Ex. 4, Supp. CP.

The exhibit established that the officer arrested Mr. Pinson and booked him into jail, that Mr. Pinson had been drinking at the time of his arrest, that the parties had a history of domestic violence, and that the last incident occurred two days prior to the alleged assault. The officer's

narrative also provides that: "*for my safety*, I detained Jared while I explained the situation to him." Ex. 4 (emphasis added), Supp. CP.

Evidence that Mr. Pinson was detained for the officer's safety and later booked into jail undermined the presumption of innocence by singling Mr. Pinson out as dangerous and guilty. *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). Similarly, information about prior domestic violence incidents encouraged the jury to assume guilt based on propensity and bad character. The evidence should not have been admitted. ER 402, ER 403, ER 404(b); *Thang*, 145 Wn.2d at 642.

Counsel had no valid tactical reason to introduce this evidence. Counsel should have redacted the exhibit to remove reference to the officer's safety, to the jail booking, and to any allusions to prior incidents of domestic violence. Counsel had no strategic purpose to introduce these portions of the exhibit. They were inadmissible, irrelevant to the defense theory, and highly prejudicial. ER 402, 403, 404(b); *Saunders*, 91 Wn. App. at 578-580; *Earls,* 379 F.3d at 494. They violated Mr. Pinson's right to a fair trial and undermined the presumption of innocence. *Jaime*, 168 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to redact portions of an exhibit that undermined Mr. Pinson's presumption of innocence and encouraged the jury to make a propensity inference based

on inadmissible and unproven prior acts. *Jaime*, 168 Wn.2d at 862. Mr. Pinson's conviction must be reversed and the case remanded for a new trial. *Id.*

2. Counsel provided ineffective assistance by opening the door to comments on Mr. Pinson's exercise of his right to silence.

Defense counsel provides ineffective assistance by opening the door to prejudicial evidence regarding the accused's exercise of the right to silence. *White v. Thaler*, 610 F.3d 890, 900 (5th Cir. 2010).

Mr. Pinson's counsel obtained state agreement to exclude any allusion to Mr. Pinson's refusal to answer Deputy Nault's question about whether the fight had become physical. RP 7. Nonetheless, during cross-examination, defense counsel asked Deputy Nault about Mr. Pinson's response to that exact question. RP 23. The state then pointed out that defense counsel had opened the door to Mr. Pinson's silence and the court agreed. RP 27-29. On redirect examination, the prosecution's questioning highlighted Mr. Pinson's refusal to answer the question. RP 32-33. In closing, the prosecutor argued extensively that Mr. Pinson's exercise of his right to silence constituted evidence of guilt. RP 94.

The court would have excluded any testimony regarding Mr. Pinsons' exercise of his right to silence absent defense counsel's opening the door. RP 7, 27-29. Counsel's pre-trial action establishes the lack of

any valid tactical reason for introducing Mr. Pinson's partial silence. Mr. Pinson's defense rested on his credibility; the evidence of his refusal to answer Deputy Nault undermined his credibility. Counsel's deficient performance prejudiced Mr. Pinson.

Defense counsel provided ineffective assistance of counsel when he failed to seek redaction of prejudicial information from Ex. 4 and when he opened the door to testimony regarding Mr. Pinson's exercise of his right to silence. Ineffective assistance of counsel requires reversal of Mr. Pinson's conviction. *Kyllo*, 166 Wn.2d at 871.

III. THE COURT ERRED IN INSTRUCTING THE JURY IN A MANNER THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF.

A. Standard of Review.

An appellate court reviews jury instructions *de novo*. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). A jury instruction relieving the state of its burden of proof can constitute manifest error affecting a constitutional right raised for the first time on review. *Id.*; RAP 2.5(a)(3).

B. The court's reasonable doubt instruction impermissibly relieved the state of its burden of proof.

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is

"the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a reasonable doubt. *Peters*, 163 Wn. App. at 847. Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give an instruction that differs from WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011). Divisions I and II approach the issue of harmlessness differently. Division I does not evaluate *Bennett* errors for harmlessness. *Castillo*, 150 Wn. App. at 473. ("The [*Bennett*] court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt"). By contrast, Division II applies the harmless error standard for constitutional error. *Lundy*, 162 Wn. App. at 870-871.[1]

Even under Division II's approach, the error here requires reversal. In *Lundy,* the trial court used a modified instruction, which differed only slightly from the pattern instruction. *Lundy*, Wn. App. at 870-71. The

[1] A recent decision noted *Bennett's* refusal to find the "*Castle* instruction" constitutionally deficient. *State v. Jimenez-Macias*, 171 Wn. App. 323, 331, 286 P.3d 1022 (2012) (citing *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997). The *Jiminez-Macias* court erroneously suggested that *Lundy* addressed "a *Castle* instructional error." *Id. Lundy* did not involve a *Castle* instruction; instead, the *Lundy* court found harmless a version of WPIC 4.01 that "modified the WPIC by reversing the order of the first two paragraphs and modifying the first three sentences of the paragraph on the State's burden of proof." *Lundy*,162 Wn. App. at 871. The instruction in *Lundy* did not contain the offending *Castle* language at issue in *Bennett;* nor did it omit the sentence missing from the instruction in this case. *Id.*

Lundy court found that the instruction correctly communicated the standards set forth in WPIC 4.01:

> [The instruction] emphasized the presumption of innocence… Furthermore, [it] accurately described the State's burden of proof by clearly instructing the jury that the State must prove each element of the crimes charged beyond a reasonable doubt *and that the defendant has no burden of proving that a reasonable doubt exists.*

Id, at 873 (emphasis added). Because the instruction correctly communicated the burden of proof and the reasonable doubt standard, the *Lundy* court found the error harmless beyond a reasonable doubt. *Id., at* 872-873.

Here, by contrast, the court omitted the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." Instruction No. 3, Court's Instructions, Supp. CP. This instruction presents the same error at issue in *Castillo.* It differs significantly from the instruction addressed by the *Lundy* court.

Unlike the instructions in *Bennett* and *Lundy,* Instruction No. 3 provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Mr. Pinson had no burden. In other words, Instruction No. 3 did not make the relevant standard manifestly apparent to the average juror. *Kyllo,* 166 Wn.2d at 864. The instruction left open the possibility that Mr. Pinson had the burden of

raising a reasonable doubt. The same error persuaded Division I to reverse.[2] *Castillo,* 150 Wn. App. at 473.

The trial court erred when it failed to instruct the jury that Mr. Pinson had no burden of proving that a reasonable doubt existed. *Castillo,* 150 Wn. App. at 473. This instructional error requires reversal of Mr. Pinson's conviction. *Id.*

IV. THE COURT ORDERED MR. PINSON TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones II); *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

B. The court violated Mr. Pinson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amend. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to

[2] The instruction in that case suffered from other flaws as well.

counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II). Under *Fuller II,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[3] *Fuller II*, 417 U.S. at 45.

[3] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation…. [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller II*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller II*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller II*, 417 U.S. at 53.

The lower court found Mr. Pinson indigent at both the beginning and the end of the proceedings. Order Assigning Lawyer, Supp CP; CP 2-3. Nonetheless, it ordered him to pay $1,200 in fees for his court-appointed attorney without first entering a finding regarding his present or future ability to pay. RP 125; CP 5-22.[4]

The court violated Mr. Pinson's right to counsel. Under *Fuller,* it lacked authority to order payment for the cost of court-appointed counsel without first finding that he had the ability to do so. *Fuller II*, 417 U.S. at 53. His case must be remanded for resentencing. *Id.*

[4] Although the court entered boilerplate language that it had "considered… the defendant's present and future ability to pay legal financial obligations…," no such consideration appears on the record and the court did not enter a finding that Mr. Pinson actually did have the ability to pay. CP 8.

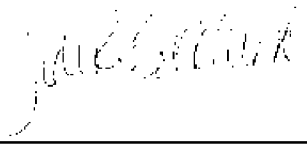
CONCLUSION

Mr. Pinson's conviction must be reversed and the case remanded for a new trial. First, the prosecutor's misconduct deprived him of his Fourteenth Amendment right to due process. Second, defense counsel's deficient performance prejudiced him and denied him the effective assistance of counsel. Third, the court's nonstandard instruction defining reasonable doubt and the burden of proof violated his Fourteenth Amendment right to due process.

If the conviction is not reversed, the order imposing attorney fees in the amount of $1,200 must be vacated.

Respectfully submitted on July 9, 2013,

BACKLUND AND MISTRY



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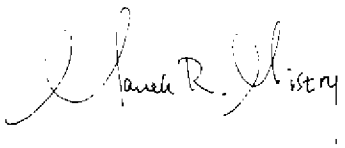

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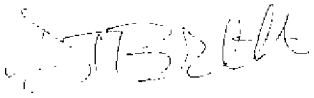

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jared Pinson
c/o Mason County Jail
P.O. Box 519
Shelton, WA 98584

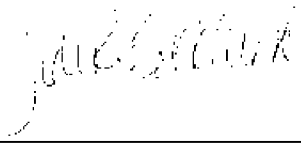
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 9, 2013.



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July 09, 2013 - 2:14 PM

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